

ATTACHMENT 3

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10 steadily has addressed all of these different issues.

11 For example, if you take a look at page
12 sixteen of their brief, they insist that Grace is
13 denying liability for virtually all of the asbestos
14 liabilities. That's just not true. What we've said
15 is that we'll pay the good stuff, the question is what
16 is the good stuff?

17 So they list -- they say Grace is denying
18 liability for ZAI, which is a certain kind of property
19 damage claim. Grace is saying that other property
20 claims are barred by the statute of limitations.
21 Grace is saying, oh, there was this huge spike in
22 personal injury claims and that's what forced them, and
23 they say Grace denies all of that.

24 The interesting thing is that in each and
25 every one of these areas, Judge Fitzgerald has worked

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1 hard and is now deciding every single one of those
2 issues.

3 So that after this brief was filed, she said
4 that the ZAI claims, which they negotiated a deal
5 thinking that they might be worth billions of dollars,
6 she's saying that they don't even pass a Dalbert
7 standard.

8 with respect to statute of limitations, she's
9 now granting statute of limitations defenses. She's

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10 now resolved a huge bunch of claims brought by
11 Prudential, very old claims. She said that they are
12 barred by the statute of limitations.

13 And, what about that enormous personal injury
14 spike? Well, that was a hundred and twenty thousand
15 claims that were pending against Grace when Grace went
16 into Chapter 11.

17 Just as a result of the questionnaire process
18 where those claimants had to file a questionnaire, only
19 half of them filed the questionnaire by the deadline
20 for submitting questionnaires. So, the spike goes
21 from a hundred and twenty thousand now down to
22 sixty-four thousand.

23 So, beneath the surface of these broad
24 claims, that somehow this is kind of flogging a dead
25 horse and nothing is happening in the very areas where

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1 they have highlighted issues of liability, Judge
2 Fitzgerald has been working incredibly hard to actually
3 decide these issues.

4 Now what she's saying is, we're going to have
5 a hearing in April on certain property damage defenses,
6 like the statute of limitations. We're going to have
7 a hearing in May on other property damage issues, like
8 is there really a sufficient hazard with the product,

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9 and in June we're going to have an estimation with
10 respect to personal injury.

11 So that by April, May, June she is going to
12 have had contested hearings, to say nothing of
13 resolving summary judgment motions, on virtually every
14 single one of the central liability issues in this
15 case. I mean, it's an absolutely spectacular
16 undertaking in terms of the amount of work that she is
17 doing.

18 So, what is she saying? She says, guess
19 what, estimation is necessary. Progress is being
20 made. Do I want, during this period of time before
21 the hearings, to be messing around with competing
22 plans, absolutely not.

23 I know that they're going to be contested,
24 there's no point in having plans that are filed unless
25 you do something with them. I know from what's

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1 already been said about this plan, that they're now
2 suggesting that they want to file, it will be
3 contested, and I'll talk about that in a minute.
4 who needs it?

5 She works -- it's all that we can do to get
6 the matters scheduled so that we can maintain this
7 pretrial schedule. So she extended exclusivity to
8 say, I want to get through all of these hearings and in
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9 July I'll take it up, and that's all that I am
10 deciding, and that is what they've decided to appeal
11 on.

12 why have they decided to take that appeal?
13 They want to have Your Honor consider all kinds of
14 matters that are near and dear to them, but that are
15 not really focused on the central holding that she made
16 regarding cost.

17 For example, they say, well, our plan is not
18 confirmable. Well, has she decided that our plan is
19 confirmable, no. She decided two years ago to defer
20 that issue until she could complete the estimation
21 process.

22 When she made that decision, did they take an
23 appeal, and bring before Your Honor the question of
24 whether our plan was confirmable, or whether
25 exclusivity should be extended given the fact that they

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1 found our plan not to be confirmable, no.

2 They didn't take any appeal regarding
3 exclusivity during that period of time, and there were
4 exclusivity extensions decided during that period of
5 time. So, the question of whether the plan is
6 confirmable or not, hasn't been crossed by the Judge.

7 Interestingly, the issue that they raise

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8 concerning confirmability, that is, are they impaired
9 within the meaning of the code, is an issue that she
10 herself has recognized, and we -- actually is, in fact,
11 in the same exclusivity hearing, could easily be
12 resolved by amending the plan. It's not as if this
13 plan is inherently unconfirmable in all respects,
14 there's an issue concerning it, just as there are
15 issues concerning their plan, which then brings me to
16 the second point.

17 Not only has she not decided that our plan is
18 confirmable, she hasn't reached that issue, has she
19 decided that their plan either is good or bad, that is
20 the plan that they say that they're going to file.
21 well, she hasn't reached that either. She hasn't
22 considered that. But, one thing that's very important
23 is, that she's already pointed out some of the huge
24 problems with that plan.

25 Just to be clear, this was -- she created a

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1 period of mediation for all parties to get together.
2 well, all parties did get together, but there were no
3 negotiations with the debtor or with Equity.

4 The folks sitting here at this table decided
5 they weren't going to have any negotiations that were
6 substantive, because as far as they were concerned,
7 there was no equity, Grace was wiped out and didn't

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8 have the say in the process.

9 so, they used this period of time of
10 mediation, where the whole case was put on hold, to
11 make their own deal, a deal that Equity wouldn't sign
12 on, and there's an active market that says that Equity
13 is worth lots and lots -- hundreds of millions of
14 dollars, that the unsecured creditors, the commercial
15 creditors weren't going to sign on.

16 In that deal, they said, we don't care what
17 the judge decides as between the relative value of
18 property damage and personal injury, we're just going
19 to divide it up eighty-five-fifteen, no matter what she
20 says.

21 Now, obviously, at the time they did that
22 deal, ZAI was still a claim that they thought was worth
23 perhaps billions of dollars. So, of course, on that
24 deal they made a lot of room, fifteen percent of total
25 value for property damage. Then it turns out, ZAI may

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1 not be worth anything at all.

2 That doesn't affect their deal. Under their
3 deal they could still pay ZAI. Under their deal the
4 allocation itself would not change, and she -- when she
5 heard about this, and I said -- I argued that this is a
6 lockup. This is an agreement that discourages

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7 settlement.

8 They say settlement with us, this is an
9 agreement that discourages settlement because it
10 assures that no matter what progress is made in the
11 evaluation of these claims, they've got it all sown up
12 on their own. She expressed skepticism.

13 If Your Honor would read the transcript in
14 exclusivity as -- at pages forty-nine through fifty,
15 it's a very interesting dialogue that she has with Mr.
16 Frankel where she says, "wait a minute. The problem
17 is if the Court has actually made a determination that
18 there are no allowable property damage claims, that's
19 the end. I don't think I can confirm a plan that says
20 you're going to pay value when I've determined that
21 there's no value that's owed, I don't think that plan
22 is confirmable." This is at page forty-nine and
23 fifty.

24 Mr. Frankel says, "Well, Your Honor, if the
25 plan is not confirmable on that basis, then obviously

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1 the agreement would fall apart." well, of course it
2 would fall apart.

3 of course, as well -- there's the problem,
4 because right now what I'm assuming that Mr. Bernick
5 has correctly articulated, that there's a form of
6 lockup agreement -- incidentally, nobody took issue

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7 with what I said in that regard, to divide up those
8 assets regardless of what the Court's valuations are,
9 then you can't propose a confirmable plan at this point
10 either.

11 So, Mr. Frankel then, and as he always is
12 very candid says, "But, Your Honor, I think that our
13 plan would be subject to what the Court orders."
14 well, God bless, that's right.

15 So was our plan, subject to what the Court
16 orders. All of the plans at this point, are subject
17 to what the Court orders on the central issue of what
18 claims are legitimate claims. He can't put the cart
19 before the horse.

20 THE COURT: Your arguments are very winded
21 here on a very simple issue, I think.

22 MR. BERNICK: Yes.

23 THE COURT: To be honest with you. You
24 know, I'm trying to find out whether it's simply the
25 decision she made again on this ninth request here was

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1 rational, reasonable, and not just some kind of a
2 fanciful or arbitrary decision

3 MR. BERNICK: That is a -- I'm sorry, Your
4 Honor.

5 THE COURT: And, I mean, the question is

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6 what supported that decision, and that's what I'm
7 looking for, is the support for her decision there.

8 MR. BERNICK: Yes. Well, I would say --

9 THE COURT: Some of it you pointed out, and
10 other points of what you said doesn't necessarily help
11 in the decision before me. Okay. What is --

12 MR. BERNICK: Yes. Well, I come back to
13 those three basic propositions --

14 THE COURT: Yes.

15 MR. BERNICK: -- because they are really the
16 essence. She says, it's necessary to get a confirmable
17 plan, that is supported and our papers point out by the
18 words from the plaintiffs' -- claimants' own lips that
19 you have the estimation.

20 Number two, that progress has been made,
21 can't be gainsaid, all the decisions that she's now
22 made on key issues such as ZAI, and the pretrial order
23 that she's now put in place that calls for the hearing
24 in June, is the best evidence that progress is being
25 made, and that the -- that the end of the day is at

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1 hand.

2 The third point is that lifting exclusivity
3 and filing competing plans will impede rather than
4 facilitate the estimation process that comes right out
5 of the fact of -- the fact that there will be

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6 litigation over it, and she already knows enough about
7 it to have spotted it, as I indicated to you, the
8 issues that are going to be litigated, and during the
9 period of time when her docket is absolutely chocked
10 full of the estimation activities that are necessary
11 for estimation.

12 Now, somebody might say, well, what's the
13 harm? So we file the plan and it kind of sits out
14 there and lays there on the shelf and we can all go do
15 estimation, that's not what's going on here.

16 First of all, she knows that as soon as that
17 plan is filed, if it were to be filed, there would be a
18 lot of discussion about the impact that that plan
19 actually has on the case, and that that would be a very
20 long and hotly contested process.

21 So, to say the plan just kind of gets filed
22 and nothing happens is, if that were really true, they
23 wouldn't be here today. The reason they want to file
24 the plan, is that they want to make it into a
25 foundation of further proceedings in the case.

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1 After the estimation is done in June, and the
2 omnibus comes up in July for the exclusivity -- where
3 the exclusivity will be considered as she has said, at
4 that point in time, they can go make their pitch at